RECORD AND BRIEFS

FILED
MAR 13 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 15-1031

IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

REPLY BRIEF OF PETITIONER

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I. THIS CASE INVOLVES MODIFICATION, NOT ENFORCEMENT, OF A DECREE.

Respondent's brief mischaracterizes the facts of this case. Respondent frames the question presented as whether "[a]greements between spouses to divide MRP ... conflict with the USFSPA." Resp. Br. 14. She claims she is merely seeking "what she bargained for," and that *Mansell* does not "limit the spouses' freedom to agree to divide MRP." *Id.* at 16-17, 27. Her bottom line is that "this Court must ... respect [Petitioner's] 'freedom of contract' to divide MRP with [Respondent]." *Id.* at 26.

However, the Arizona Supreme Court was *not* enforcing the parties' bargain or vindicating Petitioner's "freedom of contract," because the original decree did *not* divide Petitioner's waived MRP or provide Respondent with a right to indemnification. The decree stated that Respondent would receive half of Petitioner's monthly MRP payments from the federal government—*i.e.*, half of his disposable MRP. Pet. App. 41a. It said nothing about reimbursement for any future waiver.

The Arizona Supreme Court therefore explained that "[i]t was not necessary to 'enforce' the decree," as Respondent had requested, because the agency distributing the MRP "was honoring its terms." *Id.* at 10a.[1]

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[1] That state-law interpretation of the decree binds this Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he

Rather than enforce the decree as written, however, the divorce court "modified the original property disposition terms" by inserting a new provision—to which Petitioner never agreed[2]—directing Petitioner to indemnify Respondent for his MRP waiver. Pet. App. 10a. The Arizona Supreme Court upheld that modification, explaining that by virtue of Petitioner's military service during the marriage, Respondent had acquired a community property interest in 50% of Petitioner's total MRP, and her interest "vested" upon entry of the decree because it could be calculated with certainty. Pet. App. 11a-13a.

The Arizona Supreme Court's reasoning did not depend on the fact that the parties had signed a contract; it would have applied with identical force to a litigated decree. Indeed, the court mentioned that the parties had settled only once, in the facts section. Pet. App. 2a.

The distinction between enforcing and modifying a settlement agreement is important. Although the question is not presented here, an express-indemnification provision in a settlement agreement

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views of the state's highest court with respect to state law are binding on the federal courts.").

[2] Respondent states that Petitioner "acknowledged that his agreement with [Respondent] gave her a vested interest in the MRP that he could not ... unilaterally divest." Resp. Br. 14. Not so. Petitioner's position below was that Respondent "has a vested right in fifty percent of whatever amount of MRP is paid by DFAS each month." Pet. App. 11a. It was *Respondent* who successfully argued below that Petitioner could not unilaterally reduce her MRP. *Id.*

might well be enforceable. The argument for enforcing such a provision is straightforward: When a veteran voluntarily promises to indemnify his ex-spouse for waived MRP, he waives his statutory rights under the USFSPA. The USFSPA is not a straightjacket that prevents a veteran from voluntarily making an enforceable promise to indemnify his ex-spouse. And when a court enforces such a promise, it merely enforces the veteran's prior waiver; it does not illegally divide waived MRP. Just as a court violates the First Amendment if it prohibits a person from criticizing his employer but does not violate the First Amendment if it enforces a contractual non-disparagement clause, a divorce court violates the USFPSA if it divides waived MRP but does not violate the USFSPA if it enforces a veteran's contractual promise to indemnify his ex-spouse for waiving MRP.[3]

This point should not be a surprise to Respondent. At the certiorari stage, Petitioner explained that this case did not present the "analytically distinct question" of whether an express indemnification provision was enforceable, because the Arizona Supreme Court "went out of its way to hold that, as a matter of state law, the

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[3] Respondent notes that in *Mansell*, Mr. Mansell sought to reopen a settlement decree, to which he had originally acquiesced, dividing waived MRP. Resp. Br. 16. But this Court did not hold that voluntary settlement agreements involving divisions of waived MRP were unenforceable. To the contrary, it left open the possibility that state-law res judicata principles would preclude him from reopening the decree, *Mansell v. Mansell*, 490 U.S. 581, 586 n.5 (1989), and the state court so held on remand. *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989).

divorce court's order modified the decree, and did not enforce a pre-existing indemnification provision." Pet. 30-32.

Yet Respondent spends her entire brief attacking the straw man that divorce settlements should be enforced, while relegating the Arizona Supreme Court's actual justification for its holding to a cursory footnote. Resp. Br. 14 n.2.

II. THE DIVORCE COURT'S ORDER VIOLATES THE USFSPA.

A. The Divorce Court Divided Petitioner's Waived MRP.

The actual question presented is whether a divorce court may, over a veteran's objection, modify a decree to order him to reimburse his ex-spouse for the exact amount she stopped receiving as a result of an MRP waiver.

The answer is no. Neither Respondent nor the government grapple with Petitioner's lead argument (Pet. Br. 16-18): the divorce court's order directly violates federal law.

The USFSPA prohibits a divorce court from dividing any "amounts which ... are deducted from ... retired pay ... as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38." 10 U.S.C. §1408(a)(4)(B).

In this case, however, the divorce court ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability [waiver]." Pet. App. 28a. That order was the

same as an order dividing waived MRP. If the divorce court's order stated that "the decree is hereby modified so that waived MRP is now divided," the effect of such an order would be identical to the actual order entered here: In both instances, Petitioner would have to pay Respondent, out of his general assets, half of the amount waived to receive disability pay. Pet. Br. 16-18.

Notably, neither Respondent nor the government disputes that the divorce court's order was the dollar-for-dollar equivalent of an order dividing Petitioner's waived MRP.

B. The USFSPA's Preemption Provision Applies to Post-Divorce Waivers.

Respondent advances only one statutory argument to try to contradict this straightforward reasoning, and it is startling.[4] Petitioner's brief pointed out that the Arizona Supreme Court's holding was tantamount to a holding that the USFSPA's prohibition on dividing waived MRP does not apply to post-divorce waivers. Pet. Br. 27-29. Rather than dispute this characterization, Respondent runs with it; she claims that divorce courts are free to divide waived MRP, so long as the waiver occurs after the decree. She

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[4] Respondent briefly contends that the USFSPA's "saving clause" supports the indemnification order because Petitioner could satisfy it via assets other than his disability pay. Resp. Br. 31-32. As Petitioner's brief explained, that interpretation is irreconcilable with *Mansell*. Pet. Br. 50-51. Indeed, under Respondent's interpretation of the saving clause, Mrs. Mansell would have prevailed: the order in *Mansell* merely divided Mr. Mansell's waived MRP, while containing no obligation to satisfy it via Mr. Mansell's disability benefits. 490 U.S. at 585-86.

maintains that because the statutory definition of disposable MRP is written in the present tense, the USFSPA only bars a divorce court from dividing MRP that has already been waived at the time of a decree, and permits division of MRP that may be waived in the future. Resp. Br. 28; *see* Gov't Br. 15 (same).

This theory is novel. In the 35 years since the USFSPA's enactment, Petitioner is aware of no court that has ever adopted Respondent's interpretation.

On its merits, this argument is both irrelevant and incorrect. It is irrelevant because, in this case, it was the modification order, not the original decree, that divided Petitioner's waived MRP. The USFSPA plainly applies to modification orders. *See* 10 U.S.C. §1408(a)(2) (defining "court order" to include "a final decree modifying the terms of a previously issued decree of divorce"); *cf. id.* §1408(d)(7) (provision specifically addressed to modification orders). And the modification order occurred *after* the MRP waiver. Thus, even under Respondent's interpretation, the modification order impermissibly divided Petitioner's waived MRP.

Respondent's argument is incorrect because the USFSPA prohibits a divorce court from dividing waived MRP, regardless of whether the waiver predates or postdates the division order. Pet. Br. 25-35.

Respondent's reliance on the present tense in §1408(a)(4) has a fundamental flaw. If Respondent's interpretation were correct, a divorce court would be powerless to award *any* MRP when an active-duty

servicemember, who is not yet eligible for MRP, divorces. This is because, at the time of his divorce, the "total monthly retired pay to which [the] member *is* entitled," §1408(a)(4)—present tense—is zero.

Similarly, Respondent's interpretation would mean that even if a veteran were already receiving MRP at the time of a divorce, a divorce court would be powerless to award the ex-spouse a share of future cost-of-living increases in MRP. It would only be permitted to award half of what the veteran's MRP "*is*" at the time of the divorce.

That cannot be right. The correct interpretation of the USFSPA is obvious: disposable MRP is calculated at the time MRP is paid. If a court awards a percentage share of a servicemember's disposable MRP and his disposable MRP increases after his divorce (*e.g.*, because of cost-of-living increases), the ex-spouse's share likewise increases. But if it decreases after his divorce (*e.g.*, because of a waiver), the ex-spouse's share decreases.

Indeed, §1408(a)(4) presupposes that disposable MRP will fluctuate from month to month—it requires adjustment for one-time events like "overpayments" and "recoupments." *Id.* §1408(a)(4)(A). The statute makes sense only if the calculation of divisible MRP adjusts for those events when they occur.

The fact that §1408(a)(4) is written in the present tense reflects the fact that it is a definitional provision: it defines what "[t]he term 'disposable retired pay' *means*." *Id.* §1408(a)(4) (emphasis added). So someone calculating the divisible share of MRP in a particular

month would consult, at that time, the statutory definition of what "'disposable retired pay' means." It does not mean that the amount of divisible MRP is fixed at the time of the divorce.

Mansell's statement that courts cannot divide MRP that "has been waived" does not save Respondent's argument. Resp. Br. 28 (quoting *Mansell*, 490 U.S. at 594-95). This verb tense, reflecting the facts of *Mansell*, cannot reasonably be interpreted as an implied holding that MRP waived after a divorce can be divided, an issue not before the *Mansell* Court.

Respondent's interpretation fails for four additional reasons.

1. Respondent overlooks *Mansell*'s holding that because Congress had completely preempted state law on the division of MRP, a state court can divide MRP only if it has express congressional authorization. *Mansell*, 490 U.S. at 588 ("Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property"); *see* Pet. Br. 37-38. Thus, for her interpretation to prevail, Respondent must show an "affirmative grant of authority" to divide MRP that is waived following a decree. She cannot make that showing. An "affirmative grant of authority" cannot be gleaned from the use of the present tense in a definitional provision and a delicate negative inference from *Mansell*'s use of verb tense.

2. Respondent's interpretation would imply that the government routinely miscalculates ex-spouses' MRP

payments. Currently, when a veteran waives a portion of his MRP, the government deducts half of the waiver from the veteran's payment, and half from the ex-spouse's payment. *E.g.*, Pet. App. 3a. Yet if Respondent was correct, the government should deduct the *entire* waiver from the veteran's paycheck, leaving the question of an indemnification remedy irrelevant.

3. Section 1408(a)(4)(B) also prohibits division of MRP waived to obtain benefits under Title 5. Such waivers occur when a veteran who obtains a civilian government job seeks to apply his years of military service towards civil, rather than military, retirement benefits. 5 C.F.R. §831.301(c). In 1996, Congress enacted legislation requiring veterans who execute such waivers after their divorce to ensure that their ex-spouses receive a portion of their civil retirement benefits—*i.e.*, effectively indemnify them for the post-divorce waiver. 5 U.S.C. §§8332(c)(4), 8411(c)(5). This provision would be unnecessary if a post-divorce waiver did not reduce an ex-spouse's share of MRP.

4. As Petitioner's opening brief explained, permitting divorce courts to divide MRP that has been waived after the divorce would effectively strip *every* active-duty servicemember who gets divorced from protection against division of waived MRP. Pet. Br. 30-31. This would be an extraordinary outcome given that the USFSPA contains numerous protections for active-duty servicemembers; for instance, it protects servicemembers from being subjected to the divorce courts of a state in which he is stationed "because of military assignment." 10 U.S.C. §1408(c)(4). Moreover, *McCarty*'s complete preemption holding was premised

on Congress' concern with the rights of divorcing active-duty servicemembers. Pet. Br. 30-31. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The government endorses Respondent's interpretation and relies on two other statutory provisions. First, it points to prospective legislation enacted in late 2016 which ensures that when active-duty servicemembers get divorced, only their military service during the marriage—and not their military service after the divorce—counts toward calculating their ex-spouses' MRP share. Gov't Br. 15-16; Pet. Br. 41-42. This provision, which is designed to protect active-duty servicemembers, does not support the inference that Congress stripped those same servicemembers of protection over their disability pay 34 years earlier. Indeed, it directly contradicts the government's interpretation, because it defines the "total monthly retired pay to which a member *is* entitled" based on *future* changes. National Defense Authorization Act for Fiscal Year 2017, tit. VI, Pub. L. No. 114-328, §641, 130 Stat. 2000, 2164 (2016) (defining "total monthly retired pay to which a member *is* entitled" as the member's basic pay "at the time of the court order, *as increased by* ... each cost-of-living adjustment that occurs ... *between the time of the court order and the time of the member's retirement* ... ." (emphasis added)). This provision thus supports the inference that disposable MRP is to be calculated after the divorce court has entered its decree, *i.e.*, when MRP is paid.

The government also points out that the USFSPA

contemplates that divorce courts may divide MRP via numerical monthly payments. It asserts, without argument, that a numerical division in a decree could never raise federal preemption issues. Gov't Br. 16-17. In fact, it could. If a divorce court awarded an ex-spouse a dollar amount equal to half of a veteran's total MRP in order to evade *Mansell*'s restriction on dividing waived MRP—either for a pre- or post-decree waiver—such an order could surely raise a preemption question. In any event, it is hard to imagine a more oblique way for Congress to have distinguished between pre-divorce and post-divorce waivers than a statute merely observing that decrees can include numerical values.

Petitioner's brief also pointed out a series of bizarre consequences that would arise from distinguishing between pre-divorce and post-divorce waivers. For instance, it would make an ex-spouse's entitlement to reimbursement for reductions in the divorced couple's community property turn on the timing of the veteran's disability determination; favor spouses from shorter marriages, and spouses who do not rely on disability benefits during their marriages; and create an incentive to file for divorce quickly. Pet. Br. 31-35. Respondent declines to respond to these arguments, while the government merely observes that state courts may consider these facts in issuing decrees. Gov't Br. 29-30.

This is unresponsive. The USFSPA confers *federal* protection upon disabled veterans. If Congress felt state courts could adequately balance the interests of veterans and ex-spouses without federal intervention, it would not have preempted division of waived MRP at

all. The line between veterans protected by federal law, and veterans subjected to the vagaries of state divorce courts, should make sense. Respondent's proposed line does not. Congress could not have intended a veteran's federal rights to depend on the timing of a decree, or to single out for federal protection spouses from shorter marriages who did not rely on disability pay.

III. THE DIVORCE COURT'S ORDER CONFLICTS WITH THE PURPOSES OF THE USFSPA BECAUSE IT EFFECTIVELY DIVIDES PETITIONER'S DISABILITY PAY.

In the alternative, the divorce court's order conflicts with the USFSPA's purpose of ensuring that veterans keep their disability pay.

The USFSPA bars divorce courts from dividing MRP a veteran waives "to receive compensation under ... title 38"—*i.e.*, disability pay. This provision ensures that, in the context of divorce, disabled veterans keep all of their disability pay, both in form and in substance—which makes sense, given that disability pay is not deferred compensation for work performed during the marriage, but instead compensates the veteran for a present disability. Gov't Br. 20 n.10. Yet, as a result of the indemnification order, Petitioner must pay an amount equal to half of his disability pay each month to Respondent, nullifying the statute's purpose. Pet. Br. 18-24.

Moreover, all agree that disability pay is not divisible if a veteran does *not* waive MRP—for

instance, if he did not serve long enough to become eligible for MRP. Section 1408(a)(4)(B) prevents a court from, in effect, dividing disability pay if a veteran *does* become eligible for, and waive, MRP. It thus avoids the bizarre prospect of a veteran being *harmed* by becoming eligible for MRP—which, as Petitioner pointed out, is an inevitable result of Respondent's position. Pet. Br. 47-49. The government does not address this issue, while Respondent lists a grab-bag of facts about the case without disputing that Petitioner's analysis is mathematically correct. Resp. Br. 19. This analysis is due significant weight. The Court interprets statutes to avoid absurdities, and an interpretation under which eligibility for MRP can become an economic burden is an absurdity which Petitioner's interpretation avoids.

Respondent's efforts to reconcile the divorce court's order with the USFSPA's purposes are unpersuasive. Respondent first maintains that, at a high level of generality, the USFSPA's sole purpose is to "benefit the spouses of servicemembers," so its purposes cannot possibly be advanced by ruling in Petitioner's favor. This Court rejected this argument in *Mansell*. 490 U.S. at 592-94 (rejecting Mrs. Mansell's "arguments about the broad purposes of the Act" because "Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees").

Respondent next contends that the USFSPA is not intended to protect disability benefits. Resp. Br. 21-22. Of course it is. The USFSPA specifically prohibits division of MRP waived *in order to obtain disability*

pay. The only conceivable reason for such a provision is to ensure the veteran receives all his disability pay.

Respondent asserts that there is no preemption problem because "little federal interest remains after the service member retires." Resp. Br. 22. This is a strange position given that the statute bars division of waived *retirement pay*. It is even stranger in light of Respondent's position that the USFSPA protects *only* veterans who have waived MRP at the time of the divorce (*i.e.*, retired veterans), but *not* veterans who waive MRP after a divorce (which will include all divorcing active-duty servicemembers). *Supra* at 9-10.

Respondent puzzlingly states that because Petitioner's waived MRP and disability benefits are "necessarily the same," Petitioner's argument is a "fiction." Resp. Br. 23. Actually, it is *because* waived MRP and disability benefits are "necessarily the same" that the divorce court's order nullifies Congress' intent that Petitioner keep his disability benefits.

Respondent points out that the indemnification order "does not require reimbursement from any particular source of funds." Resp. Br. 24. This is irrelevant. The USFSPA prohibits division of *waived MRP*. Any time a divorce court divides waived MRP—an amount of money the veteran is no longer receiving—the veteran will have to satisfy that obligation from his general funds. Pet. Br. 18. So the fact that Petitioner must satisfy the obligation from his general funds is unhelpful to Respondent.

Moreover, this Court's cases in *Wissner v. Wissner*, 338 U.S. 655 (1950); *Hisquierdo v. Hisquierdo*, 439 U.S.

572 (1979); and *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), rebut Respondent's argument by holding that if federal law confers a benefit on one person, state family courts cannot nullify federal law by requiring the person to pay an equivalent amount to someone else. Pet. Br. 20-24. These cases are dispositive. The USFSPA guarantees a veteran the right to receive 100% of his disability pay, and the divorce court's order nullifies that right by effectively requiring him to transfer 50% of it to Respondent. Respondent's sole effort to distinguish these cases is her argument that this case purportedly involves Petitioner's "'freedom of contract'" (Resp. Br. 26), which, as explained above, is demonstrably false. *Supra* at 1-4.

The government's efforts to rebut this analysis are equally unpersuasive. Beyond a passing mention in a background discussion (Gov't Br. 10-11), the government does not address *Hillman*, on which Petitioner heavily relies. Pet. Br. 12-15, 22-24, 36, 44. Notably, in *Hillman*, the government filed a brief successfully advancing the exact argument Petitioner advances here. Br. for the United States at 19-20, *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (No. 11-1221), 2013 WL 1326956 ("That conflict [between state and federal law] is not eased by the fact that [the Virginia statute], rather than intercepting the payment of proceeds in the first place, creates a cause of action against the named beneficiary only after she has received the benefits and only 'for the amount of the payment' received. ... Any other result would permit States readily to evade federal preemption principles.").

The government relies primarily on *Rose v. Rose*, 481 U.S. 619 (1987) (Gov't Br. 25-28), a case Respondent discusses only in a footnote (Resp. Br. 22 n.5.). *Rose* does not help the government.

A word of background on *Rose*: there is a difference between a family support order (like child support or alimony) and a division of community property. Family support orders are based on a spouse's or child's need. Ariz. Rev. Stat. §§25-319, 25-320. Community property divisions enforce a spouse's property interest in half of the property obtained by either spouse during the marriage, including half of any deferred compensation such as MRP. Pet. App. 12a. This Court has recognized the distinction between these concepts. *E.g.*, *Rose*, 481 U.S. at 632 (discussing case law explaining that "family support obligations are deeply rooted moral responsibilities, while the community property concept is more akin to an amoral business relationship"). The USFSPA, too, distinguishes between the two concepts. It prohibits divisions of waived MRP, but its saving clause preserves a court's right to award and enforce alimony and child support orders. 10 U.S.C. §1408(e)(6).

In *Rose*, a father was subject to a child support order that was concededly valid. He argued, however, that the order should not be enforced because he had no money to pay child support other than his service-related disability pay. The Court held that various federal statutes related to disability pay did not preempt the enforcement of the child support order. 481 U.S. at 626-35.

That holding is irrelevant here. *Rose* did not

address MRP or the USFSPA. Even if the USFSPA had been at issue, it plainly would have authorized enforcement of the child support order—that is the point of §1408(e)(6).

Moreover, unlike this case, *Rose* did not address any issue related to the division of property. Indeed, unlike this case, the veteran was not challenging a payment obligation at all: No one disputed that he owed child support. The question was whether he could shield his disability pay from a valid court order. Here, it is the validity of the court order that is in dispute.

The government points to *Rose*'s discussion of *Wissner* and *Hisquierdo* as evidence that they do not apply to this case. Gov't Br. 27-28. The government completely mischaracterizes that discussion.

The cited discussion from *Rose* addressed the veteran's argument that the federal anti-attachment statute for military disability pay preempted the enforcement order. As recounted in *Rose*, this Court's decision in *Wissner* offered "what was clearly an alternative holding," 481 U.S. at 631, that the anti-attachment statute for federal insurance proceeds precluded the application of community property principles to those proceeds, while being "careful to identify a possible exception for alimony and child support cases." *Rose*, 481 U.S. at 631-32 (citing *Wissner*, 338 U.S. at 659-60). This Court reached a similar decision in *Hisquierdo*. *Rose*, 481 U.S. at 632 (discussing *Hisquierdo*). Finally, in *Ridgway v. Ridgway*, 454 U.S. 46 (1981), this Court held that an anti-attachment statute protected life insurance proceeds from *both* community property division *and*

family support orders. *Rose*, 481 U.S. at 633-34 (discussing *Ridgway*).

In *Rose*, the Court distinguished *Ridgway*, and thus declined to interpret the anti-attachment statute so as to protect disability benefits from valid family support orders. It reasoned that "these benefits are intended to support not only the veteran, but the veteran's family as well." *Id.* at 634. Thus, "regardless of the merit of the distinction between the moral imperative of family support obligations and the businesslike justifications for community property division"—a question on which *Ridgway* had reached a different conclusion from *Wissner* and *Hisquierdo*—it held that the anti-attachment statute "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." *Id.*

Nothing in *Rose* suggests that *Wissner*'s primary holding—that a state cannot redirect an exclusive entitlement through community property principles—does not apply to disability pay. Rather, the question was whether the anti-attachment statute applied *only* to bar community property divisions (as *Wissner* and *Hisquierdo* held), or *also* applied to enforcement of concededly valid family support orders (as *Ridgway* held). The Court decided the former. To the extent the government interprets *Rose* to authorize a state court to treat disability pay as divisible property, it simply misunderstands that case.

This case is also distinguishable from *Rose* for a more obvious reason: it involves the USFSPA, not the anti-attachment clause. The USFSPA explicitly

prohibits division of MRP waived to receive disability pay; no such language appears in any statute at issue in *Rose*. The USFSPA's plain terms cannot be reconciled with a state court order directing a veteran to pay an amount equal to half of his disability pay each month.

IV. NEITHER THE PRESUMPTION AGAINST PREEMPTION NOR THE GOVERNMENT'S CONGRESSIONAL RATIFICATION ARGUMENT APPLIES.

The Court has found preemption in numerous family law cases, including *Mansell*, *McCarty*, *Hillman*, *Hisquierdo*, and *Wissner*. It should do so here as well. Federal preemption is so plain that any presumption against preemption has been overcome.

In any event, no presumption against preemption applies. As Petitioner's opening brief explained, *McCarty* held that state law governing the division of MRP was "completely pre-empted." *Mansell*, 490 U.S. at 588. Thus, state courts could only treat MRP as community property if Congress "affirmatively grant[ed]" them authority to do so. *Id.* There is, therefore, a presumption of *preemption*. Pet. Br. 37-38. The government suggests that this complete-preemption holding does not cover the supposedly "distinct indemnification remedy." Gov't Br. 13. But that complete-preemption holding surely covers state laws that divide MRP waived after a divorce. And if this Court agrees with Petitioner that the divorce court's order, in effect, divides his waived MRP—which neither Respondent nor the government seriously disputes—complete preemption would apply.

The presumption against preemption is also inapplicable because of Congress' strong federal interest in regulating military benefits, and its long history of legislating in this area. It is incongruous to presume that Congress did not intend to interfere with divorce law when it has repeatedly gone out of its way to interfere with divorce law, and when the USFSPA's express terms interfere with divorce law. Pet. Br. 38-44.

The government acknowledges Congress' history of legislation in this area, but tries to use that history to support a congressional ratification argument. It contends that because numerous state courts have approved indemnification orders and Congress has not overruled them, Congress has ratified the result in this case. Gov't Br. 23-25, App'x.

However, as the government's appendix itself states, the vast majority of the listed cases are "Contract Theory" cases—not the issue here, *supra* at 1-4, as the government acknowledged at the certiorari stage. CVSG Br. 21-22 n.9.

Moreover, the government's appendix is incomplete. The petition identified a 5-5 split among state supreme courts on the question presented. Of the cases on Petitioner's side of the split, one (*Clauson v. Clauson*, 831 P.2d 1257, 1264 (Alaska 1992)) is not included, and another (*Kramer v. Kramer*, 567 N.W.2d 100, 110 (Neb. 1997)) is oddly listed only as "permitting post-divorce waiver to be considered in revising alimony award." And other intermediate appellate court decisions finding federal preemption on facts similar to this case, *e.g.*, *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App.

2008), are not included.

The government's ratification argument is also weakened by Congress' 1996 enactment of an indemnification provision for waivers of MRP to receive *civil service* benefits. *Supra*, at 9. Congress could have enacted a similar provision for disability benefits, but did not.

As the government acknowledged at the certiorari stage, there is "disuniformity among state supreme courts" regarding the USFSPA's effects. CVSG Br. 13; *id.* at 20-21. There is no basis to conclude that Congress silently ratified any particular legal rule.

V. THE PRACTICAL ISSUES RAISED BY RESPONDENT AND THE GOVERNMENT ARE IRRELEVANT AND MERITLESS.

Respondent and the government raise three practical concerns that, they claim, support upholding a divorce court's right to issue an indemnification order. These concerns are not properly presented in this case, and even if they were, they would not justify an order that is squarely barred by federal law.

1. Respondent claims that the modification order should be upheld because she did not realize, when she agreed to the settlement, that her share of MRP might someday decrease: "[h]ad she known that [Petitioner] could later unilaterally reduce her interest, no doubt she would have made a different bargain." Resp. Br. 18. Respondent did not make this argument below. If she had, her factual assertion regarding her state of mind, and its legal relevance, would have been litigated.

More generally, Respondent suggests that indemnification orders are justified because ex-spouses who sign divorce settlements do not realize that their share of MRP may decrease someday. It is questionable whether this is really a systematic problem. Hundreds of thousands of veterans have waived MRP in favor of disability compensation. Pet. for Cert. 28. The possibility that a veteran might waive MRP is hardly unforeseeable—as evidenced by the many reported cases in which ex-spouses have negotiated, presumably for consideration, express indemnification agreements as part of divorce settlements. *E.g.*, *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992). If an ex-spouse agrees to a settlement while truly unaware that a veteran may someday become disabled, the correct remedy is a malpractice suit against her divorce lawyer for failing to explain this. *Cf.* Col. Mark E. Sullivan, Am. Bar Ass'n, *Military Pension Division: The Spouse's Strategy* 5 (2010), http://www.americanbar.org/content/dam/aba/uncategorized/family/2011_military_silentp_mpd_spouse.authcheckdam.pdf (explaining that "careful drafting of a marital settlement agreement is the key to indemnifying the nonmilitary spouse").

That said, there may be cases in which an ex-spouse signs a decree not realizing the possibility that her share of MRP could go down. But there is a solution to this problem that complies with the USFSPA. If a court finds that the ex-spouse signed the divorce settlement based on an erroneous understanding of the risks involved, the court could reopen the decree to the

extent authorized by state law, and either allow the parties to negotiate a new settlement or enter a new decree that complies with the USFSPA. *See, e.g.*, *Youngbluth v. Youngbluth*, 6 A.3d 677, 691 (Vt. 2010) (Johnson, J., concurring).

2. Respondent theorizes that she might have agreed to an artificially low amount of alimony (also known as "maintenance") based on her incorrect assumption that Petitioner would not waive MRP. Resp. Br. 18. Once again this argument is not properly presented before the Court, as it was not raised below or in the BIO. Nor is there any factual record on the basis of the alimony calculation or the parties' intentions.

Even if this argument were properly presented, it would not justify the divorce court's modification order. Rather, if a divorce court is concerned that an ex-spouse is receiving insufficient alimony, it has the option of issuing a remedy authorized by the USFSPA: a modified alimony award.

As noted above, family support orders like alimony and child support differ from divisions of property. Family support orders are pegged to the spouse's and child's current resources and needs. *See, e.g.*, Ariz. Rev. Stat. §§25-319, 25-320. They are typically temporary—lasting until the children reach majority or the ex-spouse can become economically independent—and can be modified depending on life circumstances. *See id.*; *id.* §25-327(A). The USFSPA does not interfere with a divorce court's ability to award family support. 10 U.S.C. §1408(e)(6). Thus, if as a result of a waiver of MRP (or any other reason) an ex-spouse has insufficient resources to meet her needs, she can seek

an increased support award pegged to her needs. What she *cannot* seek is a permanent monthly payment of half of the veteran's waived MRP.

However, in this case Respondent never sought increased alimony, and the divorce court did not consider any factors pertinent to alimony. Instead, it modified the decree based on Respondent's supposed property interest in Petitioner's MRP—a pure community-property theory. This case therefore does not implicate any question related to an ex-spouse's entitlement to increased alimony as a result of an MRP waiver.

3. The government theorizes that in "equitable division" states, courts can consider a pre-divorce waiver of MRP in equitably dividing the assets. Thus, an indemnification order may restore an ex-spouse to the position she would have occupied had the divorce court been aware of the waiver of MRP before the divorce. Gov't Br. 18-22, 30.

This argument is not properly presented. Arizona is a community-property state, and the Arizona Supreme Court held that Respondent was entitled to a 50% share of Petitioner's MRP—not that the divorce court was misguided in the original distribution of property. Pet. App. 12a.

It is also wrong. The government's theory is that if a veteran had waived MRP *before* the divorce, the divorce court could have increased the ex-spouse's equitable share to compensate for the MRP waiver. Thus, the argument goes, an indemnification order replicates the decree the divorce court would have

entered if the waiver had occurred before the divorce. However, it would be *illegal* for a divorce court to compensate, dollar-for-dollar, for a pre-divorce waiver of MRP by simply increasing the ex-spouse's equitable share of the rest of the estate. If this was legal, the state court could completely nullify *Mansell*. *See, e.g.*, *Halstead v. Halstead*, 596 S.E.2d 353, 356 (N.C. Ct. App. 2004). Thus, a post-divorce, dollar-for-dollar indemnification order can never replicate a decree that would have complied with federal law.

It may be, as the government contends, that a divorce court faced with a pre-divorce waiver may *generally* consider that waiver in equitably distributing the property. Likewise, it may also be that a divorce court faced with a post-divorce waiver may issue a modification order which *generally* takes account of a waiver. Neither question is presented here. The sole question presented is whether the USFSPA preempts an order that is identical to a division of waived MRP. The answer is yes, whether the waiver occurs before or after the divorce.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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